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No. 03-220

IN THE

Supreme Court of the United States

ALLEN LEE MAY,

Petitioner,

v.

GMC MANSFIELD METAL FABRICATING; UAW INTERNATIONAL; UAW LOCAL 549,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS INTERNATIONAL UNION UAW AND UAW LOCAL 549 IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Allen Lee May has been employed by the General Motors Corporation (GMC) since 1980 in the skilled trades classification of pipefitter. During this period he has been a member of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW/Union), most recently Local Union 549 in Mansfield. During his employment May has worked under a series of collective bargaining agreements negotiated between GMC and the UAW.

May filed his action against his employer, GMC, and his union, UAW Local 549 and its parent, the International Union UAW, alleging violations of Title VII, 42 U.S.C.

2000(e) *et seq*, 42 U.S.C. 1981, state fair employment practices, breach of contract and breach of the duty of fair representation, under section 301 of the Labor Management Reporting Act, 29 U.S.C. 185. May claimed discrimination on the basis of race with regard to GMC's failure to award him the position of gas/arc welder, a lateral transfer from his skilled trades position of pipefitter, and the Union's failure to approve a journeyman welder's card to replace his pipefitter's card. (Petitioner's Brief p. 1).

At the Mansfield facility, GM employs production workers on the assembly line; maintenance workers who perform general repair and maintenance work; as well as skilled tradesman who work in specialty areas such as carpentry, welding, tool and die, and others. During his entire career at GM Mansfield, May has worked as a skilled tradesman in the pipefitter specialty classification. May, believing that the skilled trades' classification of *welder* afforded him more overtime than a *pipefitter*, looked for a transfer opening. (Petitioner's Brief p. 16). On June 17, 1999 GMC posted a job opening for a journeyman die welder and journeyman gas/arc welder, for which May and seven other employees applied.

May filed for reclassification of his journeyman card from *pipefitter* to *welder*, since the opening involved the welder's trade. This application was processed by the UAW, according to the National Agreement between GMC and the UAW, involving approval steps at the local level and at the national level by the UAW Skilled Trades Department in Detroit. Although initially granting the request to transfer, the UAW reconsidered upon the submission of information from its Local 549 in Mansfield that May lacked experience and training as a welder.

The UAW Skilled Trades Department has a policy that the trades of Pipefitter and Welder are separate and distinct, established by the UAW Executive Board and its Skilled

Trades Advisory Committee, as reflected in the ATB Memorandum between Local 549 and GM, where pipefitter and welder are listed as separate trades. Consequently, years of experience in pipefitting and plumbing are not counted toward the years of experience needed for welding.

The Skilled Trades Department ultimately concluded that May had not worked at the trade of welder maintenance for eight years; did not meet the minimum qualifications, and thus was not entitled to a welder's card. He did, however, retain his journeyman card as a pipefitter, entitling him to continue to work in that skilled trades classification. In addition, the work experience May submitted in support of his welder card had earlier been submitted for a pipefitter card. Where the two trades are considered separate and distinct, as here, years of training and experience cannot be submitted to support both.

At the time when May was seeking reclassification of his pipefitter's card, the Skilled Trades Department was processing the applications for a journeyman welder card of two Caucasian members of Local 549, Thomas Karbula and David Wert. Even though these members had worked at a non-UAW facility as May, the UAW demanded documentary proof in the form of W-2s of eight years experience. The Skilled Trades Department considered the proof submitted as insufficient, and rejected their applications for a welder's card.

GMC awarded the welder position to a Caucasian male, William French, in accordance with the collective bargaining agreement that requires open positions be filled internally to the qualified employee with the most seniority. French carried a seniority date of July 12, 1965; whereas May's was December 13, 1983.

At the conclusion of discovery, supported by Affidavits of Local Union representatives and Skilled Trades represen-

tatives of the International Union, the UAW International Union and UAW Local 549 filed motions for summary judgment. GMC filed a Motion for Summary Judgment, supported by an Affidavit of a Labor Relations Analyst, with voluminous records. May opposed the motions, supported by his own deposition and Affidavit. The District Court granted summary judgment, holding that May failed to establish a prima facie case under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). May was not treated differently from similarly situated non-class members, for Mr. French who was awarded the welder's position, had a journeyman welder's card and had more seniority than he had. (District Court Opinion pp. 17-18). The Sixth Circuit affirmed, concluding May failed to show disparate treatment because the position was filled by an individual who, unlike May, was qualified and had more seniority than May.

ARGUMENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari in this case is without merit for a number of reasons. First, Petitioner has failed to demonstrate compelling reasons, as required by the Court's rules, for the grant of a Writ of Certiorari. Second, the District Court and the Court of Appeals correctly found that Petitioner was not qualified for the position he sought via transfer and that dismissal of the case by summary judgment motion was proper. Third, the denial of a transfer from one skilled trade position to another was not an adverse employment action. Fourth, Petitioner's contention that the well-established rules of the *McDonnell Douglas* cases should be revised by this Court is without support.

A. Petitioner Has Failed To Demonstrate Compelling Reasons For A Writ Of Certiorari To Be Granted

Petitioner has not articulated any "compelling reasons" for this Court to grant a writ of certiorari, as required by Rule 10

of the Rules of the Supreme Court of the United States. The decision of the Sixth Circuit Court of Appeals does not conflict with another federal court of appeals decision on the same matter, does not conflict with a state court of last resort on a question of federal law, and does not conflict with or otherwise depart from the accepted and usual course of judicial proceedings or sanction such a departure by a lower court. The Sixth Circuit's decision did not decide an important issue of federal law which requires further settlement by this Court, nor does its decision conflict with a prior decision of this Court.

B. The District Court And The Sixth Circuit Correctly Found That The Petitioner Had Not Established A *Prima Facie* Case Due To His Failure To Show He Was Qualified

Petitioner does not contend that the Sixth Circuit and the District Court incorrectly applied well-settled law. The road map to analyze a case of indirect discrimination under Title VII has been well paved and consistently reinforced. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court established the allocation of the burden of production and the order of the presentation of proof in Title VII discriminatory treatment cases. The complainant must carry the initial burden of establishing a prima facie case that varies slightly depending on whether the claim is one for discriminatory discharge or other adverse employment decisions. This case is established by the fourfold test: showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *See McDonnell Douglas*, 411 U.S. at 802.

The Court established a burden-shifting process between the plaintiff and defendant, with the plaintiff bearing the burden of persuasion on the elements on the prima facie case. If the plaintiff succeeds in establishing the prima facie case, then the defendant must articulate some legitimate non-discriminatory reason for the employer's rejection. After the defendant articulates a reason, the plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *See McDonnell Douglas*, 411 U.S. at 802-803. *See also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981). Even though the burden shifts to the defendant to articulate some reason, Title VII does not obligate employers to show the person selected was more qualified than the plaintiff; the plaintiff has the ultimate burden of showing that he/she was the victim of intentional discrimination. *See Burdine*, 450 U.S. at 256.

For thirty years now, the *McDonnell Douglas* prima facie case has remained a clear and consistent beacon for the courts to follow. In the last ten years however, the burden shifting between the plaintiff and the defendant has been refined. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Court clarified the burden on the defendant on presentation of its legitimate business reasons, where its burden is discharged if defendant produces evidence which taken as true would permit the conclusion that there was a nondiscriminatory reason for the adverse action. If the plaintiff fails to rebut the prima facie case with such evidence, the Court must then award judgment as a matter of law. Where the defendant discharges his burden of production, the *McDonnell Douglas* framework is no longer relevant. The fact finder must then look to the ultimate question: whether defendant intentionally discriminated against the plaintiff. *St. Mary's Honor Center*, 509 U.S. at 510-511.

In *Reeves v. Sanderson Plumbing Productions*, 530 U.S. 133 (2002), the Court revisited pretext and the burden remaining on the plaintiff. The Court held that the fact finder's rejection of the employer's legitimate nondiscriminatory reason for its action does not compel judgment for the plaintiff. The ultimate question is whether the employer intentionally discriminated against the plaintiff. *See Reeves*, 530 U.S. at 147. The Court recognized however that it was permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Proof that the employer's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination. Thus, the Court concluded "a plaintiff's prima facie case combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.*, 530 U.S. at 147-48.

The Court below carefully and correctly followed the *McDonnell Douglas* four-part test to show a prima facie case as well as the burden shifting allocation of proof. Analyzing May's claim that his application for his journeyman welder's card as well as for the welder's position was a promotion case, it found that May did not satisfy the second prong of the *McDonnell Douglas* prima facie case by failing to prove that he was qualified. (Jt. App. 3a.) In addition, the employer showed that it had a legitimate business interest not to award him the position, for the person it selected had more seniority than May. Thus, it was following the collective bargaining agreement between itself and the UAW.

The Court credited the evidence of the UAW Skilled Trades that eight years experience in the trade was a necessary qualification. The Court found May was not qualified to have his pipefitter card reclassified to a welder card, for he did not work eight years in welding as

required for the card. Furthermore, he erroneously calculated his plumber apprenticeship years as counting toward the eight years required for the welding card. (District Court Decision pp. 17-18.) May's only response was that the decision making process was tainted when the UAW reconsidered its own decision upon the submission of additional evidence from Local 549. The consideration of additional evidence does not indict the process but rather fortifies it. At no time did May submit evidence that the eight years experience was not a qualification. Nor did he submit evidence that the eight-year qualification was not required for non-minority applicants.

May argues that the award of the welder's position to fellow employee French who had more qualifications than he was pretextual. Even though GMC produced evidence that French had a welder card and had more seniority than May, he objected to the nature of the proof. Again, he fails to recognize that the burden showing he was qualified and other non-minorities were treated differently is his burden rather than the employer's. (See Petitioner's Brief, pp. 20; 21-22). The Court rejected the pretext claim finding "the position was filled by an individual who, unlike May, was qualified and had more seniority than May." (Jt. App. 3(a))

A variation on the pretext theme is plaintiff may show that similarly situated employees outside the plaintiff's protected group received favored treatment. *See McDonnell Douglas*, 411 U.S. at 804. May failed to show that he was treated differently than similarly situated non-minority applicants. Two non-minority members of his Local also applied for their journeyman welder card and were denied the position.

The Courts below, thus properly applied the four-step process in establishing a prima facie case under *McDonnell Douglas*, and they properly concluded that May had not met his burden of showing that he was "qualified" for the welder's position he was seeking or the journeyman

welder card. They found May did not meet his burden of establishing a prima facie case. If he did, he failed to show the legitimate reasons produced by the UAW were a pretext.

Having failed to meet his burden, May in the alternative, argues that the Court below made a factual determination about his qualifications due to the fact that the UAW initially allowed the reclassification of his card (Petitioner's Brief, pp. 17-19.) A factual dispute was not presented because May failed to produce any evidence that the decision made by the UAW to deny his reclassification was pretextual. The unrefuted evidence in the record was that the eight years were required and that years in one trade could not be counted as years for another trade. As noted in *Burdine*, the defendant is not required to prove that the person promoted was more qualified than the plaintiff. It is the burden of the plaintiff to show that similarly situated employees were not treated equally. May has failed in his burden as the Court below noted.

C. Petitioner Failed To Show He Had Suffered An Adverse Employment Action By The Denial Of A Transfer

Although the record below is undisputed that May held a journeyman card as a pipefitter and was merely seeking a transfer to a welder's card, the Court treated the facts as a promotion case. The Court also had evidence May failed to establish an element of the fourfold test that he suffered an adverse employment action. Title VII does not forbid every act of invidious discrimination that an employer might commit against an employee; the action must be taken with respect to the employee's compensation, terms, conditions or privileges of employment, 42 USC 2000 Paragraph e-2(a). Such an event has been established where there is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly

different responsibilities, or a decision causing a significant change in benefits", *Herrinriter v. Chicago Housing Authority*, 315 F.3d 742 (7th Cir. 2002).

Adverse employment actions include terminations, demotions, loss of salary or benefits or materially adverse changes in working conditions. *Kocsis v. Multicare Management*, 97 F.3d 876, 886-87 (6th Cir. 1996) and *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542, 545-46 (6th Cir. 1999). *See also Galabya v. New York City Board of Education*, 202 F.2d 636 (2nd Cir. 2000) (no adverse employment action where transfer from one school to another without loss of benefits, prestige, or opportunities for advancement); *Fortier v. Ameritech Mobile Communications*, 161 F.3d 1106, 1111-12 (7th Cir. 1998); *Sanchez v. Denver Public Schools*, 164 F.3d 527, 532 (10th Cir. 1998) (no adverse employment action where failure to transfer teacher from one position to another a lateral transfer without reduction in wages or benefits).

Here May has not met his burden of showing an adverse employment action. When he was transferred to Mansfield in 1997 he was employed in the pipefitter classification, holding a journeyman card as pipefitter. As such, he was working in a skilled trades position of a pipefitter, a position considered better than a rank and file production worker. When the UAW initially denied May's application and transfer of his journeyman card from a pipefitter to a welder card, May suffered no adverse employment action. He retained his journeyman card as a pipefitter, and his employment at GMC. His speculation that he could receive more overtime as a welder does not change this conclusion.

D. Petitioner Has Made No Showing To Justify The Court Revisiting The Well-Established *McDonnell-Douglas* Standards In Employment Discrimination Cases

In his last gasp, May requests that the Court entirely overturn or "soften" the *McDonnell Douglas* standards for establishing the prima facie case as well as the allocation of shifting of burdens, because the framework puts too much of a burden on the Plaintiff; justice and public policy demand it. (Petitioner's Brief, p. 24.) As a result, Plaintiffs have encountered difficulty in engaging an attorney to represent them and they encounter many obstacles in their pursuit of justice. As here, May believes "justice is lost in the Court's granting of the employer's Motion for Summary Judgment" (Petitioner's Brief, p. 26.) May has invoked justice when he should have cited statutes, decisions from other jurisdictions and/or academic research.

Contrary to Petitioner's assertions, *McDonnell Douglas* is not an overly burdensome or unjust standard for a Plaintiff to satisfy. The framework has been a bedrock of consistency in a sea of judicial change that has occurred over the last thirty years in labor and employment law. Most Title VII cases are very fact oriented, and the framework developed has resulted in providing a tool by which courts can analyze these diverse situations.

This model has been flexible by incorporating concepts of other labor employment statutes in to which develop. In *Desert Palace v. Costa*, 123 S.Ct. 2148 (2003), it borrowed from mixed motive cases under 42 USC 1983, *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). The Court itself in its opinions under Title VII construing its burden have shown remarkable consistency with the exception of the refinements of "pretext" in *St. Mary's Honors Center v. Hicks*, *supra*; *see also Desert Palace* and *Sanderson*, *supra*.

Petitioner's argument for revisiting these standards is entirely to obtain a different result in the present case. Petitioner cannot simply allege that minorities have difficulties in engaging counsel to represent their interests. He needs to show more than some Title VII plaintiffs have encountered difficulty winning a case at the District Court or Court of Appeals level. He has failed to show more than a hope and a prayer.

In this case, it is doubtful that May suffered an adverse employment action. The proof submitted by Plaintiff did not meet his burden under the established *McDonnell Douglas* test. And the courts are not at a crossroads where they should consider disturbing that bedrock of Title VII law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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